STATE OF MICHIGAN

COURT OF APPEALS

RACHEL HUBER,

Plaintiff-Appellant,

v

JO-ANN STORES, INC.,

Defendant-Appellee.

UNPUBLISHED
July 20, 2004

No. 248437
Oakland Circuit Court
LC No. 2002-038391-NO

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition and dismissing plaintiff's premises liability and Persons With Disabilities Civil Rights Act (hereinafter "PWDCRA") claims. We affirm.

On November 13, 2001, plaintiff, who was on crutches for a hip condition, was visiting defendant's store when she tripped over a floor mat, while entering the store, which she contends was "bunched up" and "sort of folded" over. Plaintiff explained that as she "progressed" over the floor mat it was "curling up" and her crutches got caught in the mat causing her to fall. There was a second door, but plaintiff indicated that she thought it was an exit door. In her deposition, plaintiff acknowledged that she aware of the condition of the mat when she walked over it, but was not aware the mat would move with her as she walked across it using her crutches. Plaintiff further acknowledged that she frequented the store, but had never seen the mat in that particular condition.

In February 2002, plaintiff filed a complaint alleging that defendant was negligent on a premises liability theory, and subsequently was permitted to amend her complaint to add a PWDCRA claim. Defendant filed a motion for summary disposition, later amended to include the PWDCRA claim, which contended that it could be found as a matter of law that the floor mat was not a hazardous and/or unreasonably dangerous, and that even if it was there is no evidence that defendant had notice of the existence of any hazard. Defendant further contended that the mat was an open and obvious condition that could have been avoided through the use of an alternate door and that there is no genuine issue of material fact as to whether the condition of a mat created an unreasonably dangerous condition. Defendant supplemented its motion for summary disposition, based on the amended complaint, and contended that summary disposition was proper on the PWDCRA claim because plaintiff is not disabled as defined by the act and defendant's premises do accommodate plaintiff's alleged disability. In response, plaintiff

contended that a genuine issue of material fact existed with regard to whether the entrance was a dangerous condition, which was not open and obvious or even if it was there were special aspects creating an unreasonable danger. Plaintiff also contended that defendant had constructive notice the defect existed and was actively negligent for failing to conduct an investigation. Plaintiff further responded that she was permanently disabled under the PWDCRA for purposes of discrimination in a place of public accommodation because she suffers from a severe impairment that is expected to be permanent. On April 22, 2003, the trial court, in granting defendant's motion for summary disposition, made the following findings:

> A rug or mat in the entryway of a store is an open and obvious danger and should be apparent to the casual observer. In this case, Plaintiff saw the condition of the mat before she traversed it.
>
> Based on the evidence presented, the Court finds that there are no "special aspects" of the open and obvious condition that would differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm. A rug or mat does not involve an especially high likelihood of injury, and there is little risk of severe harm, because a fall caused by tripping on a mat would not be a fall of extended distance.
>
> Defendant also argues that Plaintiff is not "disabled" as the term is defined in the [PWDCRA]. . . . Here, Defendant has not supported its motion with any evidence showing that Plaintiff was not disabled as that term is defined. . . .
>
> * * *
>
> Since Plaintiff did have this alternate means of access, Defendant did accommodate Plaintiff's disability by providing a safe means of ingress into the store.
>
> Accordingly, Plaintiff did not raise a genuine issue of material fact regarding whether special aspects of the rug in the entryway existed in this case or that the [PWDCRA] is applicable in this case. Defendant is therefore entitled to summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff contends that summary disposition was improper on both claims. We disagree. On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(10), summary disposition is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *J & J Farmer Leasing, Inc v Citizens Ins Co*, 260 Mich App 607, 612; 680 NW2d 423 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves

open an issue upon which reasonable minds could differ. *Allstate Ins Co v State*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003).

Plaintiff's first issue on appeal is that the trial court erred in determining that there was no genuine issue of material fact regarding whether special aspects of the entrance floor mat created an unreasonable risk of harm and a dangerous condition. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitor owes a duty to his invitees to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). An invitor's liability must arise from active negligence, through an unreasonable act or omission, or through a condition of which the invitor knew or a condition of such a character or duration that the invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). This duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 195; 600 NW2d 129 (1999). An invitor must warn of hidden defects, but is not required to eliminate or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Lugo, supra*; *Riddle v McLouth Steel Products*, 440 Mich 85, 90-96; 485 NW2d 676 (1992). Basically, the "open and obvious doctrine," attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Lugo, supra* at 516. "The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000) quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

The trial court correctly determined that the floor mat in question and the condition it was in were open and obvious as it was observable upon casual inspection. Plaintiff, in her deposition, not only admitted that she observed the mat, but further acknowledged that she specifically noticed that it was "bunched up" or "sort of folded." But plaintiff indicated that she had never seen the mat bunched in the same manner, and did not believe the mat would curl further and move as she was attempting to travel over it. A person of ordinary intelligence could reasonably expect that a mat that is "bunched up" or "sort of folded," may bunch up further and move some when it is walked across. *Abke, supra* at 361-362. Therefore, the trial court correctly concluded that the dangerous condition presented by the floor mat was open and obvious because it was readily apparent to a person of ordinary intelligence. See *id*.

Plaintiff further contends that even if the condition caused by the mat was open and obvious**,** it still presented an unreasonable risk of harm. As discussed, hereinbefore, the danger of tripping and falling on the floor mat was open and obvious and a failure to warn theory cannot

establish liability. *Bertrand, supra* at 614. Indeed, people are expected to exercise reasonable care for their own safety; therefore, landowners are not required to make their premises "foolproof." *Id.* at 616-617. But a condition can still be unreasonably dangerous. In *Lugo, supra* at 517-519, our Supreme Court provided the following with regard to open and obvious conditions:

> [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. . . . Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. [Citations and footnotes omitted.]

Basically, special aspects are those conditions that create a high risk of harm or severity of harm if not avoided. *Lugo, supra* at 518-519. The *Lugo* Court provided two scenarios to demonstrate when a condition could be considered unavoidable or unreasonably dangerous. *Id*. at 518-519. The *Lugo* Court noted that in the following situation the open and obvious doctrine would not apply because the condition would be essentially unavoidable:

> [A] commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id*. at 518.]

Lugo, supra, next discussed the special aspects of a thirty foot unguarded and unmarked pit in a parking lot as posing an unreasonable risk of severe harm as:

> The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [*Id*.]

Lugo has clearly established a high standard for determining what constitutes a special aspect. Without the existence of "special aspects," an action premised on a typical open and obvious condition will be barred by the open and obvious danger doctrine. *Id*. at 519-520.

In the present case, plaintiff suggests that the bunching up of the mat created an unreasonable risk of harm. Applying the principles established in *Bertrand, supra*, and *Lugo, supra,* we do not find that the alleged danger in the instant case was unavoidable or that it presented a uniquely high likelihood of severe harm or death. Plaintiff has failed to present any evidence that the area was an unavoidable risk and defendant has provided evidence that any risk

was avoidable as plaintiff could have entered through another door. Unlike the example in *Lugo, supra*, plaintiff was not trapped inside defendant's arena so that she was effectively forced to traverse over the bunched up floor mat. Plaintiff could have used another door and avoided the "bunched up" floor mat she now claims posed an unreasonable risk of harm. Another alternative would have been for plaintiff, who noticed the condition of the floor mat, to request assistance, at which time she would have been helped or directed to the entrance without the bunched up mat. For the above reasons, the trial court correctly concluded that the dangerous condition presented by the floor mat was open and obvious because it was readily apparent to a person of ordinary intelligence, *Abke, supra* at 361-362, and, in fact, was recognized as such by plaintiff.

Plaintiff's next issue on appeal is that the trial court erred in finding there was no genuine issue of material fact regarding whether defendant accommodated plaintiff's disability under the PWDCRA. We disagree.

The PWDCRA requires persons to accommodate a disabled individual for purposes of public accommodation unless they can demonstrate that the accommodation would impose an undue hardship. MCL 37.1102(2). And, the PWDCRA requires defendant, as a place of public accommodation, to provide an "equal opportunity" for disabled individuals to use and enjoy its services and facilities. The applicable portion of the PWDCRA provides:

> Except where permitted by law, a person shall not: (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids. [MCL 37.1302(a).]

To sustain an action under the PWDCRA plaintiff is required to make a prima facie showing that defendant failed to accommodate her disability. *Cebreco v Music Hall Center for the Performing Arts, Inc*, 219 Mich App 353, 360; 555 NW2d 862 (1996). Thereafter, the burden shifts to defendant to show that the accommodation required would impose undue hardship. *Id*.

Plaintiff has offered no evidence to establish that she was in any way denied full and equal enjoyment of defendant's store due to her disability and, thus, failed to make a prima facie showing that defendant failed to accommodate her disability. Here, plaintiff had an alternative route to enter. In addition, because plaintiff noticed the condition of the rug she could have acted and sought help rather than just trying to cross the mat. Defendant did not deny plaintiff full enjoyment of the store based on her handicap because an alternative existed for plaintiff to gain access. Plaintiff's disability was fully accommodated, she just did not avail herself of the accommodation. See *Spagnuolo v Rudds # 2, Inc*, 221 Mich App 358, 362-363; 561 NW2d 500 (1997). "While the [PWDCRA][1] expressly places an obligation upon an institution or employer

[1] Formerly known as the Handicappers' Civil Rights Act (HCRA), which is the actual term used in the cited case, the Legislature changed the name of the act in 1998 to the Persons With
(continued…)

to make certain accommodations to a handicapped individual, it does not impose upon them the additional obligation to determine which accommodations are necessary to respond to each individual's distinct handicap or special needs." *Lindberg v Livonia Public Schools*, 219 Mich App 364, 367-368; 556 NW2d 509 (1996). "[N]o language in the [PWDCRA] provides an independent tort remedy for persons injured at a place of public accommodation because they are handicapped." *Spagnuolo*, *supra* at 363. Defendant provided adequate accommodations and it is unreasonable to expect defendant to make decisions for plaintiff. All defendant is required to do is provide accommodations, which defendant did; it is up to plaintiff to avail herself of these accommodations.[2] Accordingly, upon review de novo, we find that summary disposition was properly granted in favor of defendant on plaintiff's claim under the PWDCRA.[3]

Lastly, plaintiff briefly contends that the trial court erred in failing to address her State Construction Code and Michigan Penal Code claims. Plaintiff has waived review of these issues because she did not include the issues in her statement of questions presented, cites no authority, and only engages in a cursory argument on the issues. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper

(…continued)

Disabilities Civil Rights Act. See 1998 PA 20.

[2] We note that, regardless of whether there was an alternative entrance, the fact that a floor mat is bunched up in front of a doorway on one occasion, alone, does not amount to a failure to accommodate for an individual's disability under the PWDCRA.

[3] Because summary disposition was appropriate regardless, we decline to make any finding regarding whether plaintiff is disabled within the meaning of the PWDCRA.